80-1590

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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

WILLIAM J. LURIE, et al.,

Petitioners,

vs.

STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation
501 Santa Monica Boulevard
Suite 600
P.O. Box 2148
Santa Monica, CA 90406
(213) 451-9951
Attorneys for Petitioners.

QUESTION PRESENTED

When a U.S. District Court abstains from the exercise of its jurisdiction to permit resolution of state questions in state courts, HOW must a litigant inform the state court of his reservation of federal issues for adjudication in the federal courts?

To date, the bar has NO guidance this important question from ANY federal court, statute or rule.

In the absence of ANY guidance on the form such a reservation must take from courts, statutes, or rules, is it error to hold that a litigant has failed to properly reserve the federal issues when he informs the state court — in writing, before trial — that the federal issues are reserved for decision by the federal courts?

PARTIES

The parties to this case are:

Petitioners: William J. Lurie, Robert M. Beck, Richard L. Siggers, Arthur M. Friedman, Vincent J. Carroll, Bertha Friedman, William E. Kroutil, Philip S. Bergin, Louis L. Heyn, Marcel Hoessly, Richard M. Portnoy, Lee Halison, Samuel Z. Arkoff, Joseph M. Kaplan, William W. Young, Richard F. Arens, Stephen D. Schwartz, Limited Partners, Real Property Development Corporation, General Partner, of Marina Plaza, a Limited Partnership.

Respondents: State of California, California Coastal Zone Conservation Commission, an agency of the State of California, Joseph E. Bodovitz, individually and as Executive Director of the California Coastal Zone Conservation Commission, Melvin B. Lane, Fred Farr,

Jeffrey D. Frautschy, Philip W. Harry, Ira E. Laufer, Dwight May, Robert Mendelsohn, Roger Osenbaugh, Bernard J. Ridder, Jr., Richard Wilson, individually and as members of the California Coastal Zone Conservation Commission.

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No. _____

IN THE

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WILLIAM J. LURIE, et al.,

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STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioners (Property Owners) respectfully pray that a Writ of Certiorari issue to review a judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. B) is reported as Lurie v. State of California (9th Cir. 1980) 633 F.2d 786.

JURISDICTION

This is a civil action brought by the Property Owners against the State of California and its Coastal Commission, to recover just compensation for the taking of their private property by prohibiting its development. Alternatively, the Property Owners sought an order permitting development of their land. The Property Owners charged that the State's refusal to permit development of their property completely destroyed its value, thereby taking their property for public use without due process of law or just compensation.

Similar complaints were filed in both state and federal courts.[1/] The U.S. District Court abstained to permit state court resolution of state issues. A written reservation of federal issues was filed in the state court. The state courts (at all levels) denied relief.

Thereafter, the U.S. District Court concluded that the state court judgment was res judicata and dismissed the action. The District Court's judgment (App. A) was filed July 12, 1978.

The judgment of the Court of Appeals (App. B) was filed October 31, 1980. A timely Petition for Rehearing was denied December 17, 1980 (App. C).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

1/ The District Court's jurisdiction was invoked pursuant to the Constitution, 5th and 14th Amendments, 28 U.S.C. §§ 1331, 1343, 42 U.S.C. §§ 1983, 1985.

STATUTES AND REGULATIONS

There are neither statutes, nor regulations, nor rules involved. The issue is the judicially-created abstention doctrine. The need for this Court's guidance arises because there are neither statutes, nor regulations, nor rules saying how (in a state proceeding) to reserve federal issues for federal court decision.

All the bar knows is England v. Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, in which this Court said that if, in some unspecified way, the litigant informs the state court that he is discussing his federal claims only as background information, he may return to the District Court to litigate them. Indeed, England says ". . . an explicit reservation is not indispensable. . ." to return to the District Court (375 U.S. at 421-422).

STATEMENT OF THE CASE

The subject property is a 3.66 acre parcel of land at Marina del Rey (Los Angeles County's largest small boat harbor) owned by the County of Los Angeles. The Property Owners are tenants under a 60 year lease ending in 2021. The property is extraordinarily valuable, but unused. An aerial photograph of Marina del Rey (showing the subject property) is App. D.

The lease from the County to the Property Owners (under which the Property Owners have been paying more than $12,000 per year rent) requires development of the property.

The State (through its Coastal Commission) refused to permit development.

The Property Owners are thus caught between the pincers of two governmental

bodies: the County insisting on development (and charging rent) and the State refusing to permit development.

Suits were filed in state and federal court seeking relief. After the U.S. District Court abstained to permit state court resolution of state issues, the state courts denied relief.

Thereafter, when the Property Owners sought to return to U.S. District Court, after state court exhaustion, that court held that the state court judgment was res judicata, notwithstanding a written reservation of federal issues filed in the state court proceedings.

The Court of Appeals affirmed. The Court of Appeals believed that a full page, single space footnote in the body of the Property Owners' motion for a peremptory writ of mandate was not a sufficient reservation.

The issue boiled down to the question presented here:

> When a U.S. District Court abstains from the exercise of its jurisdiction to permit resolution of state questions in state courts, HOW must a litigant inform the state court of his reservation of federal issues for adjudication in the federal courts?

To date, the bar has NO guidance on this important question from ANY federal court, statute or rule.

As the Court of Appeals concluded in this case:

> "Neither England nor its progeny have defined the form such a reservation must take."
>
> (633 F.2d at 787)

Thus, the point of this Petition is simple:

- Where the judiciary's only pronouncement is that the

litigant must in some unspecified way inform the state court of his desire to litigate federal issues in the federal courts, and

- where this Court has said that such a reservation need not even be explicit, and

- where a litigant <u>does</u> inform the state courts <u>in writing</u> that the federal issues are reserved for the federal courts, then

- it is simply unjust to deny that litigant his day in federal court — particularly in light of this Court's statement that, "[w]hen the

> reservation has been made . . . his right to return [to the federal courts] will in all events be preserved." (England, 375 U.S. at 422)

The Property Owners have been denied a federal court review of federal constitutional issues:

- whether refusal to permit use of the subject property has taken property without just compensation in violation of the Fifth Amendment to the United States Constitution, as incorporated into the Fourteenth Amendment;

- whether the Property Owners were denied procedural due process of law in violation

of the Fourteenth Amendment;

- whether the Property Owners were denied substantive due process of law in violation of the Fouteenth Amendment;

- whether the standards applied to the Property Owners denied them equal protection of the law in violation of the Fourteenth Amendment;

- whether the California Coastal Zone Conservation Act is a bill of attainder;

- whether the obligation of contracts has been impaired in violation of Article 1, § 10 of the United States Constitution; and

- whether, in denying the Property Owners the right to use their property, the individual defendants violated the Civil Rights Act (42 U.S.C. §§ 1983, 1985).

The bar and the citizenry need guidance.

Litigation is not a game. Yet participants in abstention cases feel like participants not merely in a game, but in a game without rules. The only reported decisions after England involve ineffective attempts to reserve federal issues. It is as though the judiciary has abdicated its responsibility to provide guidance, settling instead for a game format in which litigants attempt to guess the right answer, while the

courts respond, e.g., "Nope", "Wrong" or "Guess again".

At bottom, it's simply not fair.

For the guidance of the bar and the public, this Court's consideration is requested.

1

WHEN A PARTY EXPRESSLY RESERVES HIS RIGHT TO HAVE FEDERAL ISSUES DECIDED IN FEDERAL COURT, A STATE COURT JUDGMENT IS NOT RES JUDICATA

The law applicable to this case was expressly stated by this Court in England v. Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 421-422:

> ". . . a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the 'reservation to the disposition of the entire case by the state courts' that we referred to in Button. That is, he may inform the state courts that he is exposing his federal claims there only

> for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than Windsor required and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved." (Emphasis added; footnotes deleted.)

Was there a reservation in this case? There was. It explained the Property Owners' position in detail. The Property Owners advised the state trial court in the following words before the state court trial:

> "4. It appearing that this Court is about to undertake the trial of such issues, the Owners hereby inform the Court that they submit to this Court for

determination only the state issues, and that they reserve for determination in the federal courts the federal issues that are present in the instant controversy.

"5. The Owners hereby inform the Court that the federal claims and issues asserted by the Owners have been pled herein only for the purpose of advising this Court of the existence of such issues and of the pendency of the federal action, and for the purpose of providing this Court with a background of this controversy. However, Owners reserve the adjudication of the federal issues to the federal courts." (CR 377; emphasis added.)

When the case was appealed, the California Court of Appeal was referred to this portion of the trial transcript in the following way.

"Finally, as pointed out to the trial court, there is a related action pending in the U.S. District Court, awaiting the outcome of this litigation. The Property Owners expressly reserve any federal issues herein for determination by the federal courts (CT 202)." (CR 378; emphasis added.)

That the federal issues may have been vigorously briefed and argued in the state court does not preclude return to the federal courts. In England, this Court expressed its understanding of the emotional dynamics of trial, concluding that passionate argument does not negate reservation of federal issues:

> "We recognize that in the heat of litigation a party may find it difficult to avoid doing more than is required by Windsor. This would be particularly true in the typical case, such as the instant one, where the state courts are asked to construe a state statute against the backdrop of a federal constitutional challenge. The litigant denying the statute's applicability may be led not merely to state his federal constitutional claim but to argue it, for if he can persuade the state court that application of the statute to him would offend the Federal Constitution, he will ordinarily have persuaded it that the statute should not be construed as applicable to him. In addition, the parties cannot prevent the state court from rendering a decision on the federal question if it

> chooses to do so; and even if such a decision is not explicit, a holding that the statute is applicable may arguably imply in view of the constitutional objections to such a construction, that the court considers the constitutional challenge to be without merit." (England, 375 U.S. at 420-421; emphasis added.)

The same is true at bench. Notwithstanding the length or intensity of the discussion, the federal issues were reserved (CR 377, 378). The state courts honored this reservation. Neither the trial court (CR 271-293) nor the Court of Appeal (CR 388- 397) purported to decide the federal issues.

The lower courts erred when they dismissed.

THERE IS NO PARTICULAR METHOD FOR RESERVING THE RIGHT TO RETURN TO FEDERAL COURT

Notwithstanding the length and complexity of the Federal Rules of Civil Procedure, there is no rule which states when or in what manner a reservation of federal issues must be made in an abstention case. Indeed, in summarizing the federal authorities, Moore could do no more than generally conclude:

> "If a plaintiff voluntarily submits the federal constitutional claim to the state court, then there is a waiver of the right to return to the federal court. On the other hand, if the plaintiff makes the constitutional claim known to the state court, the plaintiff may reserve that claim for later disposition by the federal court."
> 1A, Pt. 2, Moore's Federal Practice (1978) ¶0.203[1] at 2116 (Emphasis added.)

Case law, naturally, has been limited to the facts litigated in each case.

No court, or rule-making body, has ever laid down any specific requirements. Indeed, England, the principal case, indicates that a formal reservation is not required, if the actions of the party indicate that the federal issues are not being submitted to the state court (375 U.S. at 422).

Thus, to the extent the courts have commented on the issue, the rule has evolved that if the party lets the state court know — before it enters judgment — that the federal issues are reserved, the litigant is entitled to federal court litigation of his federal constitutional rights.

There are few reported cases which discuss this issue. The Property Owners have been unable to locate a case in

which a proper reservation was held to have been made. However, those in which the plaintiff was not permitted to pursue his federal case are instructive.

- In Godoy v. Gullota (S.D.N.Y. 1975) 406 F.Supp. 692, the plaintiff attempted to make the reservation for the first time on appeal.
- In Lecci v. Cahn (2d Cir. 1974) 493 F.2d 826 and Cornwell v. Ferguson (5th Cir. 1977) 545 F.2d 1022, the state courts were not informed that a U.S. District Court had stayed the exercise of its jurisdiction pending the litigation of state issues.

- In de Marrais v. Community College (W.D. Pa. 1976) 407 F.Supp. 79 and Reich v. City of Freeport (7th Cir. 1975) 527 F.2d 666, the federal suits were instituted after judgment in the state courts.

- In Vendetti v. Schuster (W.D. Pa. 1965) 242 F.Supp. 746, Sweet Briar Inst. v. Button (W.D. Va. 1967) 280 F.Supp. 312, and Fisher v. Civil Service Comm'n (10th Cir. 1973) 484 F.2d 1099, no reservation was made in state court.

Thus, the instances in which plaintiffs have been prohibited from prosecuting federal litigation have been those in which they either remained silent in

the state court, or attempted to make the reservation after judgment.

That is not this case.

Here, an express reservation was made in the state trial court before trial. No more was needed.

CONCLUSION

The present system is anarchy.

There are no rules.

In such a circumstance, it is unfair to penalize a litigant who makes an effort to comply with the imprecision created by the judiciary.

This petition thus seeks two things:

- reversal of the judgment, because it is unfair to require precision in the absence of rules; and

- guidance for the future for the bar and the citizenry.

This Court's consideration is amply warranted to provide rationality in the abstention procedure.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER

of FADEM, BERGER & NORTON

By: MICHAEL M. BERGER

Attorneys for Petitioners

APPENDIX A

ENTERED	FILED
July 13, 1978 Clerk, U.S. District Court Central District of California	July 12, 1978 Clerk, U.S. District Court Central District of California

EVELLE J. YOUNGER, Attorney General
of the State of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON
DONATAS JANUTA
Deputy Attorneys General
600 State Building
San Francisco, CA 94102
Tel: (415) 557-0269

Attorneys for Defendant

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM J. LURIE, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

NO. CV 74 1217 DWW

ORDER DISMISSING ACTION WITH PREJUDICE

The motion of defendants to dismiss the action above-entitled for failure of plaintiffs to state a claim on which relief can be granted against defendants, or any of them, came on regularly for hearing before this court on June 19, 1978, with the Honorable David W. Williams, Judge of the United States District Court, presiding. Defendants appeared and were represented by Evelle J. Younger, Attorney General of the State of California, by Donatas Januta, Deputy Attorney General. Plaintiffs appeared and were represented by Barrett, Stearns, Collins, Gleason & Kinney, by L. Dene Langford.

The court having duly considered the complaint on file herein, the arguments of respective counsel in support and in opposition of said motion, together with the memoranda of points and

authorities and the documentary evidence in support and in opposition of said motion, and it appearing therefrom that these same plaintiffs freely, voluntarily, and without reservation previously submitted to the State courts of the State of California the same issues, both State and federal law, which they raise in their herein complaint, and it further appearing therefrom that the State courts have adjudicated all of said issues adversely to plaintffs, thereby barring plaintiffs under res judicata from relitigating said issues in this or in any other action, therefore:

IT IS ORDERED:

1. That the complaint of plaintiffs be, and the same hereby is, dismissed without leave to file an amended complaint.

2. That the above-entitled action be, and the same hereby is, dismissed with prejudice.

DATED: /s/ July 10, 1978

/s/ David W. Williams
DAVID W. WILLIAMS
United States District Court
Judge

APPENDIX B

F I L E D

October 31, 1980
Richard H. Deane
Clerk U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. LURIE, et al.	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
STATE OF CALIFORNIA, et al.,	)
	)
Defendants-Appellees.	)
	)

No. 78-3036

DC # CV 74-1217-DWW

OPINION

Appeal from the United States District Court for the Central District of California, David W. Williams, District Judge, presiding
Argued and Submitted September 17, 1980

Before: PREGERSON, FERGUSON and NORRIS, Circuit Judges

FERGUSON, Circuit Judge:

The question raised by this appeal is whether the district court erred in dismissing plaintiffs' complaint on the ground that it reiterated claims presented to the state courts. The district court held the claims barred by res judicata. We hold that plaintiffs effectively failed to reserve their federal claims, and fully and freely litigated them in the state courts. We affirm.

I

Plaintiffs, members of a limited partnership, leased a parcel of land located within a marina owned by the County of Los Angeles. On March 6, 1974, pursuant to its authority under the California Coastal Zone Conservation Act of 1972, Cal. Public Resources Code § 27000 (repealed by § 27650)

(West 1977), the California Coastal Zone Conservation Commission rejected plaintiffs' application for a permit to construct a hotel on the leased property. Plaintiffs responded by filing suit in state court on April 23, 1974. Their complaint sought an order permitting the planned construction and damages due to the delay, or alternatively, damages as compensation for the lost value of their leasehold and their development expenditures. On May 6, 1974, they filed an almost identical complaint in United States District Court. Both complaints alleged, inter alia, violations of the due process clause and the contracts clause of the United States Constitution. The district court abstained pending resolution of the state court proceedings.

Thereafter, plaintiffs prosecuted their case in the state courts. Following a final ruling against them in the California Court of Appeal[1] and the filing of an unsuccessful petition for hearing with the California Supreme Court, plaintiffs sought to return to the district court to litigate their federal claims. Finding that they had submitted their federal issues to the state courts and had obtained rulings with respect thereto, the district court held the claims barred under the doctrine of res judicata and dismissed with prejudice.

Plaintiffs urge two independent but related grounds for reversal. First, relying on England v. Louisiana State Board of Medical Examiners, 375 U.S.

1. Marina Plaza v. California Coastal Zone Conservation Commission, 73 Cal. App. 3d 311 (1977).

411, 419 (1964), they maintain that an effective reservation of federal issues was made before the California courts. Second, they argue that the federal issues were not presented to the state courts. Both arguments are without merit.

II

In England, supra, the plaintiff challenged the constitutionality of a Louisiana statute. The district court in which the suit was filed abstained to permit the state courts to interpret the statute. The Louisiana courts construed the statute and found it constitutional. When the plaintiffs sought to return to district court, that court held the decision of the state courts to be res judicata. On appeal, the Supreme Court accepted the district

court's reasoning prospectively. Id. at 422.

England held that a party who presents federal issues to a state court and receives an adjudication of those issues is precluded from raising them a second time in federal court. Id. at 419. The Court noted that the factual inquiry as to whether federal claims had been adjudicated could be simplified by informing the state court that federal issues were not before it. Id. at 421. Neither England nor its progeny have defined the form such a reservation must take.

Plaintiffs base their first claim, that they reserved their federal issues, upon a footnote appearing on page 149 of their motion for a peremptory writ of mandate filed in the state trial court. A shorter paragraph to the

same effect appeared within a footnote to the brief plaintiffs submitted to the California Court of Appeal. Both footnotes explain that the federal district court proceeding was pending, and that the only issues submitted to the state courts involved state law.

While England fails to specify all the elements of an effective reservation, it does state that the party making the reservation must "inform" the state court of its intent to reserve federal issues. Id. at 421. Plaintiffs' "reservation" fails to satisfy this requirement. There is no indication that the state trial court was aware of plaintiffs' desire to preserve their federal claims for later presentation to the federal district court. All the parties to the state action

proceeded as if the federal claims were in issue.

To accept plaintiffs' argument that a reservation buried on the 149th page of a motion can preserve federal claims would undermine res judicata. A reservation serves the practical purpose of informing the court that certain issues are not before it. We refuse to turn it into a talisman which, when secreted as it was here, insulates adjudicated issues from the doctrine of res judicata. Fairness demands that, to be effective, a reservation be brought to the court's attention. The reservation in this case failed to meet this standard.

III

Plaintiffs' second claim asserts that the district court erred in concluding that they, "[f]reely, voluntarily and without reservation previously submitted

to the state courts . . . the same issues, both state and federal law, which they raise in their herein complaint . . . ." They maintain that federal issues were touched upon only to the extent necessary to satisfy the requirement that a state tribunal be put on notice of related federal questions. See England, supra, at 419-21; Government Employees v. Windsor, 353 U.S. 364, 366 (1957). The record in the state trial court belies this contention. Plaintiffs explicitly submitted and argued the federal issues to the court.

The district court dismissed plaintiffs' complaint for failure to state a claim upon which relief could be granted. However, because the court looked to documentary evidence in addition to the pleadings in granting

the motion to dismiss, that dismissal is more properly characterized as a summary judgment. See Fed. R. Civ. P. 12(b); Black v. Payne, 591 F.2d 83, 89 (9th Cir.), cert. denied, 444 U.S. 867 (1979). Under these circumstances we can uphold the lower court's dismissal if summary judgment in favor of the defendant would have been proper at the district court level. Engineering Inc. v. United Technologies Corp., 614 F.2d 1244, 1247 (9th Cir. 1980); Potrero Hill Community Action Comm. v. Housing Authority of San Francisco, 410 F.2d 974, 974 (9th Cir. 1969).

Summary judgment is proper:

> only where there is no genuine issue of any material fact or where viewing the evidence. . . in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law.

Preaseau v. Prudential Insurance Co. of

America, 591 F.2d 74, 80 (9th Cir. 1979) (citations omitted). Examination of the record, informed by this standard, reveals that summary judgment could have been properly granted by the district court.

The complaints filed in the state and district courts were substantially the same. Both alleged that the actions taken by the Coastal Commission violated plaintiffs' rights guaranteed by the due process and contracts clauses of the United States and California constitutions. In addition, plaintiffs submitted a notice of motion for peremptory writ of mandate to the state trial court in which they argued, inter alia, that (1) federal constitutional law forbids a state from taking property without justly compensating its owners; (2) the right to own and dispose of property is

a fundamental right guaranteed by the United States and California constitutions; (3) the California Coastal Zone Act is a bill of attainder in violation of the United States Constitution and is unconstitutionally vague under the due process and equal protection clauses; (4) the failure of the Coastal Commission to provide adequate notice of the issues it was considering violated the due process clauses of the United States and California constitutions.

The complaint in the state court and the motion for peremptory writ of mandate urged both state and federal constitutional claims. The state trial court made specific findings of fact and conclusions of law in response to plaintiffs' allegations of unconstitutional taking and denial of prodedural due process. It cannot be suggested that

the federal constitutional issues were not before the state trial court. See Lecci v. Cahn, 493 F.2d 826, 830 (2d Cir. 1974). The fact that the affirmance by the California Court of Appeal makes no mention of the federal issues is irrelevant. See Grubb v. Public Utilities Commission, 281 U.S. 470, 477-78 (1930); Lecci v. Cahn, supra, at 830.

In England, supra, the Supreme Court balanced two competing policies underlying res judicata and abstention. The Court first noted that Congress, in providing for concurrent federal jurisdiction in specific categories of cases, was concerned that qualified litigants not be denied an opportunity to have a federal court determine their claims. England, supra,

at 415. The Court went on the delcare, however, that there was:

> [n]o reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries.

Id. at 419.

In affirming the district court, we are mindful of plaintiffs' right to a federal forum and of the necessity of respecting state court judgments. Plaintiffs first sought to have their rights determined in state court; there is little reason to fear that they have involuntarily lost their opportunity to litigate in federal

court. However, the order in which the two complaints were filed is not crucial to our decision. Because plaintiffs fully and freely litigated their federal claims before a state tribunal, res judicata forecloses a second opportunity to litigate those claims.

The judgment is AFFIRMED.

APPENDIX C

F I L E D

Dec 17 1980
Richard H. Deane
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. LURIE, et al.	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
STATE OF CALIFORNIA, et al.,	)
	)
Defendants-Appellees.	)
	)

No. 78-3036

DC# CV 74-1217-DWW

ORDER

Before: PREGERSON, FERGUSON and NORRIS,
Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

D-1.